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[43-227—64——1

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 196

AIR TERMINAL SERVICES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1a) is reported at 330 F. 2d 974.

JURISDICTION

The judgment of the Court of Claims was entered on April 17, 1964. The petition for a writ of certiorari was filed on June 18, 1964. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether a contract between petitioner and the United States whereby petitioner was granted a concession to park automobiles on certain designated lots at an airport operated by the United States contained

an implied warranty that the United States would make no substantial changes concerning on-street public parking during the contract period.

STATUTE INVOLVED

The Act of June 29, 1940, 54 Stat. 687, § 2, 7 D.C. Code 1302, provides:

> Sec. 2. The Administrator shall have control over, and responsibility for, the care, operation, maintenance, and protection of the airport, together with the power to make and amend such rules and regulations as he may deem necessary to the proper exercise thereof.

STATEMENT

Petitioner, a corporation engaged in the operation of concessions at various airports, filed a suit in the Court of Claims seeking damages for the alleged breach of a contract by the United States granting to petitioner a concession to operate automobile parking lots at the Washington National Airport. The airport is operated by the defendant through the Civil Aeronautics Administration[1] (hereinafter referred to as the "C.A.A."). Petitioner claims that the United States, after the contract was entered into, installed, without petitioner's consent, 122 additional parking meters along the roadway running past the two airport terminals thereby

[1] Now the Federal Aviation Agency.

breaching an implied warranty not to alter the pre-existing basis upon which petitioner contracted.

The contract was entered into by petitioner and respondent on October 6, 1957, and provided *inter alia* (Pet. App. 30a–31a):

> Article I—*Rights of Contractor*
>
> (a) Concession: The Government hereby grants unto the Contractor, subject to all the terms, conditions and covenants of this agreement, the right, power, privilege and authority to conduct and operate an automobile parking business or concession at the Airport.
>
> (b) Space: The Government hereby grants unto the Contractor the right to occupy and use space at the Airport as follows:
>
> * * * * *
>
> 2. Automobile Parking Facilities: Those areas marked 1, 6, 7, 8, and the official parking area shown and identified on Exhibit No. 1, attached hereto and made a part hereof.

No other areas were granted to petitioner for the operation of the parking concession nor did the contract grant to petitioner an exclusive franchise for public parking at the airport (Pet. App. 35a). In fact, representatives of the C.A.A. had given consideration to whether the United States should grant an exclusive franchise for public parking but rejected the idea in order not to restrict the govern-

ment in the expansion of public parking at the airport (Pet. App. 35a).[3]

Petitioner began business operations under the three-year contract on the same date that the agreement was signed. In October 1958, following extensive widening of the roadway and traffic circle leading to the main terminal, the C.A.A. installed 101 new parking meters along the traffic circle and roadway to supplement the 32 meters in existence at the time the contract was entered into (Pet. App. 4a–5a). In February 1959, the C.A.A. removed seven meters at the traffic circle and added 28 new meters in front of the recently completed North Terminal Building. In all, a total of 122 new metered parking spaces were added (Pet. App. 4a–5a). The primary reason for the street widening was to provide greater loading and unloading convenience for the public and to expedite a safe flow of traffic. An improved flow of traffic also required additional short-term public parking. Meters were added primarily to control the increased parking space because they enable the relatively small police force assigned to the airport to enforce the limited parking simply and efficiently (Pet. App. 4a–5a, 46a). Changes in the traffic pattern at the airport had been under consideration by

[3] Other concession contracts at National Airport between petitioner and the United States did contain clauses specifically granting petitioner the exclusive right to conduct the particular business at the airport. For example, petitioner's contract for the barber shop concession provided that "The Government will not grant to any other person, during the term of this agreement, the right to engage in this same primary business in the Terminal Building" (Pet. App. 35a).

C.A.A. officials periodically since at least 1952 (Pet. App. 3a), but at the time petitioner made its bid for the parking concession, it was not made aware of any contemplated changes (Pet. App. 4a).

The Court of Claims found that following installation of the additional meters petitioner's revenue from short-term parking dropped from 33 percent of total gross income in the first year of operation to 16 percent and 12 percent in the second and third years, respectively (Pet. App. 6a, 46a). The court also found that the primary and proximate cause of this decrease in petitioner's revenue was the installation of the new meters (Pet. App. 46a).

The lower court held, however, two judges dissenting, that petitioner was not entitled to recover damages for breach of contract because the contract in question contained no implied warrant by the government that it would not increase non-concession public parking during the period of the contract (Pet. App. 10a). Moreover, the court stated that the installation of the additional parking meters to control parking and traffic was a "sovereign act" of the government for which it is not liable in contract (Pet. App. 12a). Accordingly, the petition was dismissed.[1]

ARGUMENT

1. The issue in this case is plainly not of sufficient importance to warrant review by this Court. Petitioner is claiming that a particular contract granting

[1] At the same time, the court entered judgment for the government on its counterclaim for revenue due from petitioner under the contract.

a concession contained an implied warranty that the government would not change the situation with regard to parking existing at the time of the contract. The resolution of this question turns on the particular facts of this case and presents no issue of general importance.

Even considered most broadly, petitioner is only claiming that government concession contracts generally contain such an implied warranty. The question is not of substantial, continuing importance; petitioner cannot point to other similar cases now pending or likely to be brought and the issue can be easily avoided for the future by simple changes in concession contracts. The parties can readily include in their contracts an express provision either that the concession is to be exclusive (as is included in some other contracts with petitioner) or that the government must pay compensation if it alters the factual situation existing at the time the contract was entered into.

Moreover, the decision below is correct. An implied warranty that the government would make no substantial changes regarding short-term parking at the airport necessarily means relinquishment of the government's power (see 7 D.C. Code 1302, *supra*, p. 2) to change parking and traffic in the public interest. The facts found by the court establish that the government would not have agreed to relinquish this authority (Pet. App. 35a–36a), and therefore voluntary relinquishment of the power delegated to the agency by Congress may not be implied. *Bateson-Stolte, Inc.* v. *United States*, 305 F. 2d 386, 389 (Ct. Cl.); *McGuire* v. *United States*, 305 F. 2d 449 (Ct. Cl.).

2. Petitioner emphasizes (Pet. 5–8) the discussion in the opinions below relating to the "sovereign act" doctrine, *i.e.*, that the government may not be held liable for acts obstructing the performance of contracts to which it is a party, so long as the acts are public and general and committed in its sovereign capacity. *Horowitz* v. *United States*, 267 U.S. 458, 461. However, since that is at most an alternative holding, there is no occasion to consider that question in this case. It is enough for present purposes that the Court of Claims had substantial basis for concluding that the instant contract contained no implied warranty.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

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